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Public participation in Decision-Making at the International Seabed Authority

Hannah Lily, Jeff Ardron, Aline Jaeckel



Summary

Deep-seabed mining in the Area is regulated by the International Seabed Authority (ISA) which is mandated to act on behalf of humankind as a whole. Consistent with international environmental law and human rights norms, in its decision making the ISA is expected to engage with its broad constituency. Using ten assessment criteria, this paper analyses the extent to which the ISA has facilitated public participation to date. This paper finds that, while the ISA has increased outreach activities, significant scope for improvement remains. Several ways to improve public participation at the ISA are identified, including (1) proactive consultation with a wider reach, including stakeholders that are hitherto not engaged; (2) mechanisms to ensure stakeholder consultations and submissions are given due consideration, and that the rationale for decisions are publicly communicated; and (3) enhanced public engagement in the implementation of decisions.

Acknowledgements

The key messages of this publication are premised on the following book chapter (with permission from the publisher) and all references are contained in the original chapter: J Ardron, H Lily and A Jaeckel, 'Public Participation in the Governance of Deep-Seabed Mining in the Area' In R Rayfuse, A Jaeckel and N Klein (eds), *Research Handbook on International Marine Environmental Law* (2nd edn) 2023, Edward Elgar.

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1. Introduction

The International Seabed Authority (ISA) acts as the custodian of the Area; i.e., the seabed and the natural resources beyond national jurisdiction, which is the ‘common heritage of [hu]mankind’. The ISA is now poised, on behalf of all of humankind, to take decisions on whether or not to allow deep-sea mining (DSM) to start, knowing that it will harm the marine environment and transfer common heritage resources into private ownership, in exchange for royalty payments.

In this context, and in light of increasing complaints about a lack of transparency at the ISA, it is timely to ask: who represent the interests of humankind at the ISA, and does the ISA sufficiently engage with those representatives and interests?

International norms of ‘public participation’ continue to evolve. More than twenty years ago, public participation was recognised as a right by many states through the Aarhus Convention,¹ and again more recently through the Escazú Agreement,² which further elaborates upon best practices. Considering international policy and practice more generally, the aforementioned treaties, and the relevant literature, we identify ten contemporary benchmarks of best practice for public participation in decision making, and assess the ISA’s practices and evolving legal regime against them. Table 1 offers an overview of the ten benchmarks while the remainder of this discussion paper offers a summary of our findings.

¹ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447.

² Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (adopted 4 March 2018, entered into force 22 April 2021) UNTC XXVII-18.

Criteria	Short description
1. Representativity	Participants should comprise a broadly representative sample, especially those who could be affected, without prejudice.
2. Proactive, early and full engagement	Public should be involved as early as possible and throughout the process as soon as value judgments become salient. Public outreach, before and during the process, should actively solicit comments and participation.
3. Independence	The participation process should be conducted in an independent, unbiased way.
4. Transparent process	The process should be transparent so that the public can see what is going on and how decisions are being made.
5. Structured process	The process for participation should be clearly structured and explained.
6. Defined public role	The nature and scope of PP should be well defined.
7. Resource accessibility	Participants should have (or be assisted in gaining) access to the appropriate resources to enable them to successfully participate under equal conditions.
8. Influence	The output of the procedure should be given due consideration and the public should be informed of how their views influenced decisions.
9. Proportionality / cost-effectiveness	The procedure should in some sense be cost-effective and proportional to the scale of the possible impacts.
10. Provision of environmental information	Environmental information used in the decision-making process should be provided –in a readily accessible format.

Table 1: Evaluation criteria for best practices in public participation, adapted, expanded and re-ordered from Rowe and Frewer.³ For cross-references of the criteria with the Aarhus Convention, Almaty Guidelines,⁴ and Escazú Agreement, please see the full book chapter: J Ardron, H Lily and A Jaeckel, 'Public Participation in the Governance of Deep-Seabed Mining in the Area' In R Rayfuse, A Jaeckel and N Klein (eds), *Research Handbook on International Marine Environmental Law* (2nd edn) 2023, Edward Elgar

³ Gene Rowe and Lynn J Frewer 'Public participation methods: a framework for evaluation' (2000) 25 *Science, Technology, and Human Values* 3.

⁴ UNECE 'Almaty Guidelines: Promoting the Application of the Principles of the Aarhus Convention in International Forums' Decision II/4, ECE/MPPP/2005/2/Add5, 20 June 2005.

2. Options to improve public participation at the ISA

2.1 The ISA should look beyond its current focus on State representation

Decisions taken by the ISA affect the interests of all humans, both current and future. Not all States are members of the ISA, and lack of engagement at the ISA by those States who are members affects their ability to represent the diversity of their societies. (Additionally, it cannot be guaranteed that all governments fairly represent the interests of all their constituents.) Law and practice have recognised certain groups as historically under-represented in State-based decision-making procedures, including indigenous peoples and local communities, and those suffering discrimination due to gender, age, ethnicity, language, religion, or political opinion. To enable broad public participation, the ISA should look beyond its current focus on State representation.

The ISA does enable participation in proceedings by observer organisations who can ‘demonstrate their interest in matters under consideration’ at the ISA, but observer numbers are low, with few representing historically marginalised communities. To date, efforts of the ISA Secretariat to engage stakeholders more broadly have been limited. For example, ISA workshops have been criticised for a narrow invitee-base and favouring DSM contractors. Moreover, a draft Stakeholder Engagement and Communications Strategy for the ISA identified stakeholders only as those already ‘interacting with the ISA’, while the Strategic Plan for the ISA focuses on publication of scientific data to experts, rather than making information accessible to the public at large.

2.2 Public engagement should be proactive, occur early and continue throughout the process

Recent efforts to publicise the ISA’s work are commendable and include: an enhanced internet presence, live-streaming of annual sessions, webinars open to the public, and online consultations on policy and regulatory instruments. However, to reach beyond the small group of stakeholders already active in, and knowledgeable about, the ISA, proactive outreach is required. The Exploitation Regulations, currently being drafted, appear likely introduce positive requirements for publication of information and consultation, as well as a broad definition of ‘stakeholder’, but they still contain no obligation for contractors, States or the ISA proactively to identify and communicate with any group beyond States.

2.3 The participation process should be conducted in an independent, unbiased way, with recourse to justice

A blurring of internal roles at the ISA makes independence and impartiality a challenge: the ISA and its members stand to benefit financially from DSM, while also regulating DSM contractors and protecting the environment from the impacts of their activities. ISA organs comprise States, who may themselves be DSM contractors, beneficiaries of DSM, and political actors with diplomatic relationships to protect. This should enhance the need for public participation in decision-making as a means of incorporating external viewpoints, expertise, and independent oversight, as well as recourse to

justice. However, to date, no formal procedures exist through which any third party can file a complaint to or about the ISA or its contractors, and the ISA Secretary-General is the de facto final arbiter for complaints made against his own decisions. The draft Exploitation Regulations make no provision for an Ombudsperson or other impartial entity able to conduct independent inquiries into allegations about the ISA and its activities, nor provide any protections for whistle-blowers.

2.4 The decision-making process should be transparent, with clear participation mechanisms

The ISA has no policy or standardised procedure for structured participatory processes. Formalised consultation procedures have been proposed at different times, e.g. in relation to the development of Standards and Guidelines, as well as Regional Environmental Management Plans (REMPs), but have not been adopted. Thus, procedures remain ad hoc, at the discretion of the ISA's Secretariat or the Legal and Technical Commission (LTC), the ISA's advisory body. The LTC is itself often criticised for a lack of transparency. It meets in private, and its recommendations – often the only documentation seen by the decision-making Council or the public – contain little detail of rationale, discussion, dissonance, or uncertainties.

Recently, some transparent practices have been incorporated, e.g. online consultations for regulatory instruments, with stakeholder responses published online, and summarised in a report to the ISA's Council. Other processes (e.g. for development of REMPs), however, have been less transparent, based on closed, invitation-only workshops, with little access for the wider public.

The draft Exploitation Regulations would ensure some public scrutiny of ISA decision-making, but would not close all gaps. For example, the current draft allows unlimited mining contract extensions without stakeholder input, and does not provide for public consultation in periodic reviews of contractor performance or interim reviews of the contractually agreed plans of work for mining. The Regulations also do not expand options for administrative or judicial review beyond the limited rights provided by the UNCLOS dispute resolution provisions, in which observers and civil society have no standing .

An ISA Stakeholder Engagement and Communications Strategy could help define a role for the public in ISA activities. However, the first (and only) draft of said Strategy, released by the Secretariat in 2020, was criticised for appearing to restrict rather than facilitate stakeholder involvement in the work of the ISA. A revised version of the Stakeholder Engagement and Communications Strategy remains pending.

2.5 Cost-effectiveness, proportionality and resources to support participation

The expected magnitude, spatial extent and timescale of the environmental impacts of DSM require proportionately extensive public engagement. This would assist the ISA in the difficult task of determining what level of risk and harm is deemed acceptable, in exchange for the minerals and royalties. As noted above, such widespread public outreach is yet to take place.

Attending meetings at the ISA headquarters in Jamaica for several weeks a year may be prohibitively costly for many. Online participation was trialled during COVID, but has since stopped, though it may resume in the future. The ISA's trust funds aimed at defraying travel costs are accessible only to State representatives, not civil society, and are chronically short of funds. No cost-effectiveness assessment of ISA trust funds appears to ever have been conducted.

2.6 Comments should be taken into account by the decision-maker, and the public should be informed of how their views influenced decisions

In current (ad hoc) ISA consultation processes, stakeholder responses have sometimes, but not always, been published, but there has usually been no indication of whether and how comments have been taken into account. Comments submitted verbally during ISA meetings, including line-by-line textual analyses of draft Regulations, sometimes go unrecorded and unactioned. Where consultation is envisaged in the draft Exploitation Regulations, contractors or ISA organs are not required to explain how comments have influenced their subsequent decisions, or why they were not taken on board.

2.7 Environmental information used in the decision-making process should be readily accessible

Overall, there remains a paucity of deep-sea scientific data. Contractor surveys could, in principle, fill critical gaps in knowledge. ISA exploration contractors report scientific data annually to the ISA, in a variety of formats. Data reporting templates introduced in 2015 have led to somewhat greater consistency in reporting, though data collection methods are not standardised. In 2020, the ISA launched ‘DeepData,’ an online data repository that, while a significant and long-awaited advancement, is deeply flawed. DeepData is difficult to use, lacks full functionality, omits historical information that does not fit the reporting format, is rife with inconsistent naming, vagaries and misidentification of species, and lacks supporting metadata that explain how the data were collected. ISA contractor reports remain confidential in part, or wholly inaccessible. The ISA rules do prohibit ‘confidential’ status being assigned to material that ‘relate[s] to the protection and preservation of the Marine Environment’. Operationally, however, geological data are excluded, because contractors have simply labelled them as ‘confidential’, resulting in them being treated as such.

Under the current ISA regime, there is no requirement for environmental performance reports to be made public. This may change with stronger information-sharing principles in the draft Exploitation Regulations, though these do not detail what that might entail.

3. Conclusion

None of the ten public participation benchmarks identified in the paper have been met by the ISA.

While the ISA has made some positive changes to enhance access to information, it still tends to focus on engagement with an inner circle of stakeholders. It lacks institutional procedures to set minimum standards for consultation with stakeholders, and it can be difficult, even for engaged actors, to know what decisions are being taken at the ISA, let alone to take part in them.

To better align the ISA's work with contemporary norms and expectations for public participation, reflected in international law and policy, decisive action is needed to increase proactive consultation with a wider and diverse stakeholder-base prior to decisions being made. First, the ISA should strive to represent all of humankind, including those who have historically been unheard. Second, the ISA should also adopt procedures to ensure that stakeholder submissions are given due consideration by its organs, with detailed reporting of the rationale for decisions and remaining uncertainties. Lastly, the ISA could better enable assistance of external parties in operational activities, such as environmental impact assessment, and monitoring. Broadening the ISA's opportunity for public participation in these ways, could significantly improve the robustness of ISA decision-making, as well as establishing public trust and confidence in those decisions.

Given the significant consequences for the marine environment of DSM, and concerns raised by some States and civil society groups, the necessity of public debate might appear self-evident. A small group of delegates cannot alone gauge what value the public attaches to the deep ocean, what is the global appetite for environmental risk, and what financial returns are deemed sufficient for losses associated with the mining of common heritage resources. To date, however, the ISA has done disappointingly little to facilitate discussion on these global questions.

4. About the authors

Hannah Lily is a British regulatory lawyer of over 20 years' professional experience. Hannah has worked with countries in Africa, the Caribbean and the Pacific Islands region on legislative reform relating to extractive industries and ocean governance, including projects with the Commonwealth Secretariat, Pacific Community, and UNEP. She holds particular expertise in relation to seabed mining, has published two model laws in this area, and has advised more than 50 government delegations during international negotiations on seabed mining.

Dr Jeff Ardron is a former Senior Fellow at IASS with more than 30 years of experience in environmental governance, marine science, planning, and conservation, in a wide range of sectors –governmental, inter-governmental and non-governmental, private, research and academia. He has co-founded two NGOs, three international initiatives, and served on boards for several others. He has more than 60 papers in the peer-reviewed literature, as well as co-authoring a textbook on marine policy. He conceived and currently leads the Commonwealth Blue Charter programme for the Commonwealth Secretariat in London.

Dr Aline Jaeckel is a Research Associate in the Ocean Governance team at IASS as well as an Associate Professor in law at the Australian National Centre for Ocean Resources and Security (ANCORS) at the University of Wollongong. Her research focuses on law of the sea and international law with a particular focus on the regulation and governance of deep seabed mining. She has acted as an advisor and consultant and has authored numerous publications including a monograph on 'The International Seabed Authority and the Precautionary Principle' (Brill, 2017).



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Contact:

Hannah Lily: hannahlilylaw@outlook.com

Jeff Ardron: jeff.ardron@gmail.com

Aline Jaeckel: aline.jaeckel@iass-potsdam.de

Address:

Berliner Strasse 130

14467 Potsdam

Tel: +49 (0) 331-28822-340

Fax: +49 (0) 331-28822-310

Email: media@iass-potsdam.de

www.iass-potsdam.de

ViSdP:

Prof. Dr Mark G. Lawrence,

Managing Scientific Director

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